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Westech Sdn Bhd v Thong Weng Lock

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(i)-4–10 OF 2015 (B)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), SURIYADI, BALIA YUSOF FCJJ AND DAVID WONG JCA
24 JULY 2017

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Bankruptcy — Act of bankruptcy — Postponement of act of bankruptcy — Judgment debtor ('JD') applied to strike out/stay bankruptcy notice ('BN') served upon him — Application dismissed by court's registrar 5 1/2 months later — JD appealed to judge in chambers against decision but before appeal could be heard judgment creditor ('JC') filed creditor's petition ('CP') against JD — Whether act of bankruptcy committed by JD for failure to comply with BN postponed until the time registrar dismissed application or until time appeal heard and disposed of — Construction of r 95(2) of the Bankruptcy Rules 1969 ('the BR') — Whether CP properly filed within six months of commission of act of bankruptcy — Section 5(1)(c) of the Bankruptcy Act 1967 — Whether even though JD applied to set aside BN under r 18 of the BR by filing summons in chambers with affidavit, application came under r 95 once JD deposed that he had counterclaim, set off or cross-demand which equalled or exceeded amount of JC's judgment debt

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The main issue in this appeal was whether, pursuant to r 95(2) of the Bankruptcy Rules 1969 ('the BR'), the act of bankruptcy committed by a judgment debtor ('JD') for failing to comply with the requirements of a bankruptcy notice ('BN') served upon him was postponed only until the time his application to set aside the BN was dismissed by the registrar of the High Court or whether such postponement continued until his appeal against the dismissal was heard and disposed of. Under the said r 95(2), if the JD's application to set aside the BN could not be heard before the time specified in the BN for compliance with its requirements, then 'the registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined ...'. In the instant case, the appellant judgment creditor ('JC') served a BN on the respondent on 24 October 2011. Pursuant to s 3(1)(i) of the Bankruptcy Act 1967 ('the BA'), the respondent would have committed an act of bankruptcy if he failed to comply with the requirements of the BN within seven days of its service. On the seventh day after the service, the respondent applied, by way of summons in chambers supported by affidavit, to strike out/stay the BN. Six grounds were raised in the affidavit, one of which was that the respondent had a counterclaim, set off or cross-demand against the JC. The registrar dismissed

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A the application 5 1/2 months later, on 13 April 2012, whereupon the respondent filed an appeal to the judge in chambers against the decision. However, before the appeal could be heard, the JC filed a creditor's petition ('CP') against the respondent on 27 August 2012. The respondent's attempt to set aside the CP before the registrar failed and he was adjudged a bankrupt. In
B his appeal to the judge in chambers, the respondent argued that the CP was invalid because: (a) if the act of bankruptcy was committed on 1 November 2011 (ie seven days after the service of the BN), the CP should have been filed within six months of that date pursuant to s 5(1)(c) of the BA; and (b) if, pursuant to r 95(2) of the BR, the act of bankruptcy was postponed until the
C time the application to set aside the BN was heard and determined, then that postponement should not cease when the registrar had dismissed the application but should continue until the respondent's appeal to the judge in chambers had been heard and disposed of. The JC, however, argued that
D r 95(2) only permitted the act of bankruptcy to be deferred until the time the registrar had determined the application and did not include the appeal; that the CP was valid since it was filed within six months after the registrar dismissed the respondent's application on 13 April 2012. The judge in chambers decided in favour of the JC, holding that the act of bankruptcy was
E committed on 13 April 2012, that the CP was valid and that the bankruptcy orders against the respondent were properly made. The Court of Appeal ('the COA'), however, set aside the High Court's decision holding that there was no act of bankruptcy to support the CP as the respondent's application to set aside the BN could not be regarded as having failed until his appeal against the
F registrar's decision had been heard and disposed of. The Federal Court granted the respondent leave to appeal against the COA's decision on the following questions of law: (i) whether the act of bankruptcy committed by the respondent was deferred until the time the registrar dismissed the application to set aside the BN, notwithstanding the appeal against that decision had not
G yet been heard; (ii) whether the respondent's appeal to the judge in chambers had the effect of suspending or postponing the act of bankruptcy; and (iii) whether the JC was entitled to present the CP after the registrar dismissed the application to set aside the BN but before the appeal to the judge in chambers was disposed of. Although the respondent maintained that his application to
H set aside the BN fell under r 18 of the BR, as it was made by way of summons in chambers supported by affidavit, the JC argued that because the respondent had deposed that he had a counterclaim, set off or cross-demand which equalled or exceeded the judgment debt, the application consequently came within the purview of r 95 of the BR.

I **Held,** allowing the appeal, setting aside the COA's decision and reinstating the decision of the High Court:

(1) The act of bankruptcy was committed when the respondent's application to set aside the BN was dismissed by the registrar, notwithstanding that

his appeal to the judge in chambers had yet to be heard. The JC was entitled to present a CP against the respondent following the registrar's decision and before the hearing of the appeal. The respondent's appeal to the judge in chambers did not have the effect of suspending or postponing the act of bankruptcy (see paras 20 & 52).

(2) The language of r 95 of the BR was such that it could only admit to the construction that once the registrar had listened with attention (with the contents of the affidavit being central in the hearing) and meted down a decision which dismissed the challenge, the matter ended there. There was no need to wait for the appeal to be heard first by the judge in chambers, like a normal litigation under appeal, before r 95 took effect. Shorn of all the trimmings, with the challenge having been rejected by the registrar, a deferment of the act of bankruptcy took place and the count-down of the six months began. The way was then open for the CP to be filed. This construction of r 95 of the BR was in line with other jurisdictions (as in the United Kingdom and India) which had equipollent provisions (see para 51).

(3) Despite the respondent contending that the application to set aside the BN fell under r 18 of the BR, both the judge in chambers and the COA explicitly decided otherwise and there was no reason to disturb that finding and differ from the position that the application fell under r 95 of the BR. Under r 95, when an affidavit in support of an application disclosed that the deponent had an appropriate counterclaim, set off or cross-demand which equaled or exceeded the amount of the judgment debt, that affidavit operated as an application to set aside the BN. The respondent did just that, and by his unwitting act, his application (made by way of summons in chambers with affidavit) was converted into an application under r 95 of the BR. Rule 95 was a statutory exception which deferred an act of bankruptcy committed under s 3(1)(i) of the BA. While r 95 of the BR was a special provision that dealt with the setting aside of a BN, r 18 of the BR was a general procedural provision that catered for a party that wished to file any necessary application that fell outside r 95 (see paras 16, 33, 35–37 & 39).

[Bahasa Malaysia summary

Isu utama dalam rayuan ini adalah sama ada, menurut k 95(2) Kaedah-Kaedah Kebankrapan 1969 ('KK'), tindakan kebankrapan yang dilakukan oleh penghutang penghakiman ('JD') kerana gagal untuk mematuhi kehendak notis kebankrapan ('NK') yang diserahkan kepadanya telah ditangguh hanya sehingga waktu permohonannya untuk mengetepikan NK ditolak oleh pendaftar Mahkamah Tinggi atau sama ada penangguhan berterusan sehingga rayuannya terhadap penolakan didengar dan dilupuskan. Di bawah k 95(2), jika permohonan JD untuk mengetepikan NK tidak boleh didengar sebelum masa yang ditetapkan dalam NK untuk mematuhi dengan kehendaknya, maka

'the registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined ...'. Dalam kes ini, perayu pemiutang penghakiman ('JC') menyerahkan satu NK terhadap responden pada 24 Oktober 2011. Menurut s 3(1)(i) Akta Kebankrapan ('AK'), responden telah melakukan satu tindakan kebankrapan jika dia gagal untuk memenuhi kehendak NK dalam masa tujuh hari dari tarikh penyerahannya. Pada hari ketujuh selepas penyerahan, responden memohon, melalui cara saman dalam kamar disokong oleh afidavit, untuk membatalkan/menunda NK. Enam alasan telah dibangkitkan dalam afidavit, satu yang mana responden menuntut balas, *set off* atau tuntutan silang terhadap JC. Pendaftar menolak permohonan 5 1/2 bulan kemudian, pada 13 April 2012, yang mana responden memfailkan rayuan kepada hakim dalam kamar terhadap keputusan. Walau bagaimanapun, sebelum rayuan dapat didengar, JC memfailkan petisyen pemiutang ('CP') terhadap responden pada 27 Ogos 2012. Percubaan responden untuk mengetepikan CP di hadapan pendaftar gagal dan dia telah diisytiharkan bankrap. Dalam rayuannya kepada hakim dalam kamar, responden menghujahkan bahawa CP adalah tidak sah kerana: (a) jika tindakan kebankrapan dilakukan pada 1 November 2011 (iaitu tujuh hari selepas penyerahan NK), CP sepatutnya difailkan dalam masa enam bulan dari tarikh itu menurut s 5(1)(c) AK; dan (b) jika, menurut k 95(2) KK, tindakan kebankrapan telah ditangguh sehingga waktu permohonan untuk mengetepikan BN didengar dan diputuskan, maka penangguhan itu tidak sepatutnya berhenti apabila pendaftar menolak permohonan tetapi sepatutnya berterusan sehingga rayuan responden kepada hakim dalam kamar telah didengar dan dilupuskan. JC, walau bagaimanapun, menghujahkan bahawa k 95(2) hanya membenarkan tindakan kebankrapan ditunda sehingga masa pendaftar telah menentukan permohonan dan tidak termasuk rayuan; bahawa CP adalah sah kerana ia difailkan dalam masa enam bulan selepas pendaftar menolak permohonan responden pada 13 April 2012. Hakim dalam kamar membuat keputusan berpihak pada JC, memutuskan bahawa tindakan kebankrapan telah dilakukan pada 13 April 2012, bahawa CP adalah sah dan bahawa perintah kebankrapan terhadap responden dibuat sewajarnya. Mahkamah Rayuan ('MR'), walau bagaimanapun, mengetepikan keputusan Mahkamah Tinggi memutuskan bahawa tiada tindakan kebankrapan untuk menyokong CP kerana permohonan responden untuk mengetepikan NK tidak boleh dianggap gagal sehingga rayuannya terhadap keputusan pendaftar telah didengar dan dilupuskan. Mahkamah Persekutuan membenarkan permohonan responden untuk memohon terhadap keputusan MR menurut soalan berikut: (i) sama ada tindakan kebankrapan dilakukan oleh responden telah ditunda sehingga masa pendaftar menolak permohonan untuk mengetepikan NK, meskipun rayuan terhadap keputusan itu belum didengar; (ii) sama ada rayuan responden kepada hakim dalam kamar mempunyai kesan menggantung atau menangguh tindakan kebankrapan; dan (iii) sama ada JC berhak untuk mengenakan CP selepas pendaftar menolak permohonan untuk mengetepikan NK tetapi sebelum rayuan kepada hakim dalam kamar

dilupuskan. Walaupun responden mengekalkan bahawa permohonannya untuk mengetepikan NK jatuh di bawah k 18 KK, kerana ia dibuat melalui saman dalam kamar disokong oleh afidavit, JC menghujahkan bahawa responden telah memberi keterangan bahawa dia mempunyai suatu tuntutan balas, *set off* atau permintaan silang yang menyamai atau melebihi hutang penghakiman itu, permohonan itu terangkum dalam bidang kuasa k 95 KK.

Diputuskan, mengetepikan keputusan Mahkamah Rayuan dan mengakas keputusan Mahkamah Tinggi:

(1) Tindakan kebankrapan telah dilakukan apabila permohonan responden untuk mengetepikan NK telah ditolak oleh pendaftar, meskipun rayuannya kepada hakim dalam kamar masih belum didengar. JC berhak untuk mengenakan CP terhadap responden berikutan keputusan pendaftar dan sebelum mendengar rayuan. Rayuan responden kepada hakim dalam kamar tidak mempunyai kesan untuk menggantung atau menangguh tindakan kebankrapan (lihat perenggan 20 & 52).

(2) Bahasa k 95 KK adalah bahawa ia hanya boleh menerima tafsiran bahawa apabila pendaftar telah mendengar dengan teliti (dengan kandungan afidavit menjadi material utama dalam pendengaran) dan menjatuhkan hukuman yang menolak cabaran, perkara itu tamat di situ sahaja. Tiada keperluan untuk menunggu rayuan untuk didengar terlebih dahulu oleh hakim dalam kamar, seperti litigasi normal di bawah rayuan, sebelum k 95 memberi kesan. Pendek kata, dengan cabaran yang ditolak oleh pendaftar, penangguhan kebankrapan berlaku dan kiraan mundur enam bulan bermula. Jalan kemudiannya terbuka untuk CP difailkan. Tafsiran k 95 KK adalah sejajar dengan lain-lain bidang kuasa (seperti di United Kingdom dan India) yang mempunyai peruntukan yang sama nilainya (lihat perenggan 51).

(3) Walaupun responden menghujahkan bahawa rayuan untuk mengetepikan NK terangkum di bawah k 18 KK, kedua-dua hakim dalam kamar dan MR secara jelas memutuskan sebaliknya dan tiada alasan untuk mengganggu dapatan itu dan menentang bahawa rayuan terangkum di bawah k 95 KK. Di bawah k 95, apabila afidavit menyokong suatu permohonan mendedahkan bahawa deponen itu mempunyai tuntutan balas, *set off* atau tuntutan silang yang bersamaan atau melebihi jumlah hutang penghakiman, afidavit itu dikendalikan sebagai permohonan untuk mengetepikan NK. Responden hanya melakukan itu, dan dengan tindakannya yang tidak disengajakan, permohonannya (dibuat melalui saman di dalam kamar dengan affidavit) telah ditukar menjadi permohonan di bawah k 95 KK. Kaedah 95 adalah pengecualian statutori yang menunda perbuatan kebankrapan yang dilakukan di bawah s 3(1)(i) AK. Walaupun k 95 KK adalah peruntukan khas yang berkaitan dengan pengenepian NK, k 18

KK adalah peruntukan prosedur am yang memenuhi syarat untuk pihak yang ingin memfailkan permohonan yang diperlukan yang terangkum di luar k 95 (lihat perenggan 16, 33, 35–37 & 39).]

Notes

For cases on act of bankruptcy in general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3252–3288.

Cases referred to

A Debtor (No 10 of 1953); ex parte the debtor v Ampthill Rural District Council and Another, Re [1953] 2 All ER 561, Ch D (refd)

A debtor (No 44 of 1978), ex parte the debtor v Chantry Mount and Hawthorns Ltd, Re [1979] 3 All ER 265, Ch D (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298; [1993] 3 CLJ 324, SC (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (refd)

Kamarul Ariffin Mohd Khaidzir ex p Majlis Amanah Rakyat, Re [2002] 8 CLJ 905, HC (refd)

Ng Yen Kok v AmFinance Bhd (formerly known as MBf Finance Bhd and prior to that was known as Arab-Malaysian Finance Bhd) [2013] 4 MLJ 225; [2013] 1 LNS 366, CA (refd)

Venkatlal Govindlal v Juggilal Kamalapat Hosiery [1955] ILR Bom 1059, HC (refd)

Legislation referred to

Bankruptcy Act 1914 [UK] s 4(1)(c)
Bankruptcy Act 1967 s 3(1)(i), 5(1)(c)
Bankruptcy Rules 1915 [UK] r 140
Bankruptcy Rules 1952 [UK] rr 139(2), 179
Bankruptcy Rules 1969 rr 18, 18(1), 94(1)(b), 95, 95(2), 117
Presidency Towns Insolvency Act 1909 [IND]
Rules and Forms of High Court at Bombay [IND] r 52-C

Appeal from: Civil Appeal No B-03(IM)-195–11 of 2013 (Court of Appeal, Putrajaya)

Su Tiang Joo (Pang Kong Ling and Shelby Chin with him) (Cheah Teh & Su) for the appellant.

Bastian Vendargon (R Sarengapani with him) (RS Pani & Assoc) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] This appeal arose pursuant from a bankruptcy proceedings commenced by the judgment creditor ('the appellant') against the judgment debtor ('the respondent'). The appellant had served a bankruptcy notice ('BN') on the respondent on 24 October 2011.

[2] Under s 3(1)(i) of the Bankruptcy Act 1967 ('the BA'), an act of bankruptcy is committed upon the expiry of seven days from the date of service of the BN. In this case, on the premise that no legal impediment exists, the act of bankruptcy begins from 1 November 2011. Any creditor's petition ('CP') to be filed, must be done within six months of the latter date (s 5(1)(c) of the BA).

[3] To strike out or stay the BN, the respondent filed a summons in chambers (the impugned BN application) on 31 October 2011, one day before the act of bankruptcy took effect. The words used in the application were 'dibatalkan atau digantungkan'. The respondent submitted that his application was pursuant to r 18 of the Bankruptcy Rules 1969 ('the BR').

[4] Rule 18(1) of the BR requires applications to be made by summons in chambers ('SIC'), and unless the Chief Justice provides otherwise, the SIC must be supported by an affidavit. The impugned BN application did indicate that the affidavit dated 31 October 2011 of one Thong Weng Lock was attached to it, as evinced in the core bundle of the respondent. Premised on this affidavit, the appellant submitted that the impugned application was pursuant to r 95 of the BR.

[5] Six grounds were supplied by the respondent as to why the BN could be struck out, inter alia, that he had a set off, counterclaim or cross-claim against the appellant (see para 4.6 of the affidavit).

[6] The senior assistant registrar ('the registrar') on 13 April 2012 dismissed the BN application except for the stay. This stay order later lapsed. Being dissatisfied with the dismissal, the respondent filed an appeal to the judge in chambers.

[7] Before the appeal was heard by a judge in chambers, the appellant filed a CP on 27 August 2012.

[8] As said above, the BA provides that any CP must be filed within six months from the date the act of bankruptcy is committed. For purposes of this case, as said above, without any legal impediment being present, the filing date of the CP ought to be on or before 1 May 2012 ie the very position taken up by

A the respondent. In this case the CP was filed on 27 August 2012, clearly about three months outside the last allowable statutory period, as submitted by the respondent. The appellant justified the 'delay' on the ground that the act of bankruptcy had been deferred.

B **[9]** The respondent in order to show cause against the CP, must file a notice with the registrar, specifying the statements in the CP which he intends to deny or dispute (r 117 of the BR). This the respondent did on 26 September 2012.

C **[10]** A day later, ie on 27 September 2012, the respondent filed a simple *notice of application* ('NOA') rather than by SIC to strike out or stay the CP (*dibatalkan atau digantungkan*), a mode of application that again did not comply with r 18 of the BR.

D **[11]** On 17 April 2013 the registrar dismissed the striking out and stay application of the CP by the respondent. On the same day, the registrar proceeded to grant a receiving order ('RO') and an adjudicating order ('AO') as prayed for in the CP.

E **[12]** The respondent then filed an appeal to the judge in chambers on 23 April 2013, inter alia, against the RO and AO.

[13] The appeal pertaining to the BN application, which was ventilated in
F the RO and AO appeal, was eventually heard and decided by the High Court before Mohamad Zabidin bin Mohd Diah J.

[14] The respondent's stance before Mohamad Zabidin bin Mohd Diah J was that as the BN was served on 24 October 2011, the act of bankruptcy was
G committed on 1 November 2011 (after having taken into account the expiry of seven days from the service of the BN). The CP thus was filed out of time.

[15] The appellant disagreed and argued that it filed the CP within the statutorily stipulated time, and was in compliance with s 5(1)(c) of the BA. The
H basis of the argument of the appellant was premised on r 95 of the BR in particular r 95(2) of the BR. The appellant argued that as the matter had been *heard and determined* by the registrar, and the respondent's challenge had failed, the act of bankruptcy had been deferred to 13 April 2012. The appellant thus had breathing space to file the CP but restricted within the statutorily
I stipulated time.

[16] The judge in chambers in his grounds of judgment dated 9 May 2014 stated that even though the impugned BN application was filed by way of SIC the application was made pursuant to r 95 of the BR. The basis of the Court of

Appeal's decision subsequently was also premised on r 95 of the BR. This is a finding of fact of both courts which we do not intend to disturb. A

[17] The judge in chambers decided on 27 September 2013 that the act of bankruptcy was indeed deferred. He ruled that the act of bankruptcy was committed on 13 April 2012 (the decision date of the registrar). He found that the CP was filed well within the six months period, and accordingly dismissed the appeal, thus upholding the RO and AO. In the course of his judgment the learned judge said: B

> [6] After going through the submission and the authorities submitted, I find the JD's application dated 31 October 2011 to set aside or stay the bankruptcy notice was in fact an application made pursuant to r 95 and not under r 18. The act of bankruptcy, therefore was deferred and was only committed on 13 April 2012 as stated in the creditor's petition and thus the filing of creditor's petition was made within the six months period. Hence I dismissed the JD's appeal ... C D

[18] Being dissatisfied with the judge in chambers' decision, the respondent filed a singular notice of appeal to the Court of Appeal. On 16 May 2014 the Court of Appeal allowed the respondent's appeal and set aside the whole decision of the High Court. The Court of Appeal in gist held the view that 'the act of bankruptcy is not committed until that challenge fails'. E

[19] The Court of Appeal opined that the respondent's appeal regarding the challenge of the BN could not be said to have failed when the appeal to the judge in chambers against the registrar's decision was still pending. That being so, the CP was issued without an act of bankruptcy having been determined to have been committed ie the basis of a CP. F

[20] Dissatisfied with the decision of the Court of Appeal, the appellant applied for leave before us, and on 19 October 2015 successfully obtained leave on the following questions of law: G

(a) whether the act of bankruptcy is committed when the judgment debtor's application to set aside the bankruptcy notice is dismissed by the registrar, notwithstanding that his appeal to the judge in chamber is yet to be heard? H

(b) whether the judgment debtor's appeal to the judge in chambers against the decision of the registrar dismissing his application to set aside the bankruptcy notice has the effect of suspending or postponing the act of bankruptcy? and I

(c) whether the judgment creditor is entitled to present the creditor's petition after the judgment debtor's application to set aside the

bankruptcy notice has been dismissed by the registrar but before his appeal to the judge in chambers is disposed of?

[21] A perusal of the notice of appeal to the Federal Court filed by the appellant shows that it was an appeal against the whole decision of the Court of Appeal for having reversed the High Court's decision.

[22] The crux of the questions relates to the issue of whether the appellant is entitled to present the CP after the respondent's application to set aside the BN had been dismissed by the registrar, but before his appeal to the judge in chambers was heard.

THE APPELLANT'S SUBMISSION

[23] The appellant submitted that the Court of Appeal erred in holding that the act of bankruptcy is not committed until the respondent's appeal to the judge in chambers against the order of the registrar is dismissed.

[24] This submission is based on the wordings of r 95(2) of the BR, which includes, inter alia, '... until the application has been heard and determined', strongly suggesting that the deferment is until the application is dismissed at the first instance by the registrar, rather than until the subsequent appeal is dismissed by the judge in chambers.

[25] Learned counsel for the appellant contended that courts from other common law jurisdictions with similar statutory provisions have held that the act of bankruptcy is committed when the application to set aside the BN is dismissed by the registrar, regardless of whether there is a pending appeal against such dismissal.

[26] In support of his argument the appellant brought to our attention the United Kingdom provisions of rr 139(2) and 179 of the Bankruptcy Rules 1952 and two related cases viz *Re a debtor (No 10 of 1953); ex parte the debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561 and *Re a debtor (No 44 of 1978), ex parte the debtor v Chantry Mount and Hawthorns Ltd* [1979] 3 All ER 265.

[27] The appellant also submitted on the comparable provision of India ie r 52-C of the Rules and Forms of High Court at Bombay under the Presidency Towns Insolvency Act 1909. He also referred to the case *Venkatlal Govindlal v Juggilal Kamalapat Hosiery* [1955] ILR Bom 1059 (per Chagla CJ), which approved the principle founded in *Re a debtor (No 10 of 1953)*.

[28] The Federal Court case of *Dr Shamsul Bahar bin Abdul Kadir v RHB*

Bank Bhd and another appeal [2015] 4 MLJ 1, and *Ng Yen Kok v AmFinance Bhd (formerly known as MBf Finance Bhd and prior to that was known as Arab-Malaysian Finance Bhd)* [2013] 4 MLJ 225; [2013] 1 LNS 366 (a Court of Appeal case) were also brought to our attention, with the latter case approving *Re a debtor (No 10 of 1953)*.

THE RESPONDENT'S SUBMISSION

[29] In reply, learned counsel for the respondent argued that as the SIC mode for setting aside the BN was alluded to, the challenge fell under r 18 of the BR. For any party wishing to challenge a defective BN, the latter provision was the conduit to allude to.

[30] In the instant case, the respondent's basis for the challenge was manifold. He submitted six grounds, amongst them, that there was no final judgment from the sessions court, there was non-fixing of the hearing date by the registrar by giving not less than three clear days' notice, and time was not extended to comply with the BN. The sixth ground was that he had a cross-claim, a counterclaim or set off against the appellant. As the leave questions concerned only whether the act of bankruptcy was deferred after the matter was heard by the registrar, but before the appeal was disposed of by the judge in chambers, we chose to focus on ground six only.

[31] In the course of the appeal, the respondent conceded that r 95 of the BR would be applicable if the grounds for setting aside the BN were 'cross-claim, counterclaim or set off which exceeds the judgment sum'. This was an unhelpful concession for the respondent as the affidavit of the respondent did carry those words and grounds.

[32] The respondent rested his case on the submission that he committed an act of bankruptcy seven days after having been served with the BN ie on 24 October 2011. As the CP was filed outside the permitted period it was thus invalid.

DECISION

[33] Despite the respondent contending that the application fell under r 18 of the BR, but as both the judge in chambers and the Court of Appeal have explicitly decided otherwise, we see no reason to differ from the position that this was an application under r 95 of the BR.

[34] For ease of reference we reproduce r 18 of the BR and it reads as follows:

18 Applications to be made by summons in Chambers.

(1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

(2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.

[35] As an initial observation, we hold the view that r 18 of the BR is a general procedural provision. It caters for a party that wishes to file any necessary application that falls outside r 95 of the BR (see *Re Kamarul Ariffin Mohd Khaidzir ex p Majlis Amanah Rakyat* [2002] 8 CLJ 905 per Ramly Ali J (as he then was)). Unless the Chief Justice decides otherwise, the application must be made by SIC, supported by an affidavit.

[36] Rule 95 of the BR is a special provision that deals with the setting aside application of a BN. It reads as follows:

95 Application to set aside.

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined ...

[37] Construing r 95 of the BR, when an affidavit in support of an application discloses that the deponent has an appropriate counterclaim, set off or cross-demand which equals or exceeds the amount of the judgment debt (r 94(1)(b) of the BR), that affidavit operates as an application to set aside the BN (*Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298; [1993] 3 CLJ 324 (SC)). The respondent did just that ie he disclosed that he had an appropriate counterclaim, set off or cross-demand which equals or exceeds the amount of the judgment debt. By his unwitting act, the application was converted into an application under r 95 of the BR.

[38] The affidavit, in short, a written sworn statement of fact made by a deponent under oath or affirmation, administered by a person authorised to do so by law, incidentally is also the evidential basis to decide on the matter.

[39] Rule 95 of the BR is the statutory exception which defers an act of bankruptcy committed as envisaged by s 3(1)(i) of the BA. It is couched with stringent requirements and legal effects, in particular the portion of r 95(2) of

the BR which reads, '... no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined'. A

[40] For purposes of our appeal, it is factually undeniable that the impugned BN application was heard and determined by the registrar on 13 April 2012 when he judicially dismissed it. B

[41] The leave questions essentially relates to questions of construction of r 95(2) of the BR ie whether the phrase 'until the application has been heard and determined' means until the application is dismissed by the registrar or until the subsequent appeal is dismissed by the judge in chambers. Generally speaking an appeal is a continuation of a litigation, and it is no surprise that the Court of Appeal stated that the challenge has not been exhausted unless finally decided by the judge in chambers. In short, the running of time was suspended until the appeal was disposed of by the judge in chambers. The Court of Appeal on the other hand stopped short at the door steps of the judge in chambers when opining that the matter is still at large unless heard and determined by him. No doubt if we answer questions (a) and (b) in the positive, the existence of any number of appeal tiers thereafter will not make the slightest difference to the issues before us. C D E

[42] To arrive at the proper construction of the words 'heard and determined' in its ordinary and natural meaning suffice if we make reference to *The New Shorter Oxford English Dictionary* (edited by Lesley Brown, Vol 1A-M, Clarendon Press, Oxford, 1993). It states that 'heard' means 'listen (to) with attention or understanding' whereas 'determined' means 'decided or resolved on, settled'. In short, for purposes of the current appeal, the registrar had listened to both parties intently, and at the culmination of the hearing arrived at a judicial decision. F G

[43] We now look at some foreign jurisdiction provisions for guidance. The United Kingdom has r 139 of the Bankruptcy Rules 1952 as the avenue providing for a setting aside application of a BN. The rule reads as follows: H

> 139 Application to set aside [Form 9]
>
> (1) The filing of the affidavit referred to in Rule 137 shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall, if he is satisfied that sufficient cause is shown, fix a time and place for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor, and their respective solicitors, if known. I
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> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time,

A and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

[44] It is observed that the wordings of r 95 of the BR are in pari materia with r 139 of the United Kingdom Bankruptcy Rules 1952.

B

[45] In *Re a debtor (No 10 of 1953); ex parte the debtor v Ampthill Rural District Council and Another* [1953] 2 All ER 561, the Chancery Division had occasion to discuss when the act of bankruptcy was completed. In this case a local authority obtained judgment against the judgment debtor. Subsequently the local authority served a BN in respect of the judgment debt, and, pursuant to r 140 of the Bankruptcy Rules 1915, the debtor filed an affidavit in opposition (which operates as an application to set aside the BN). On 10 September 1952 the registrar dismissed the debtor's application. Under s 4(1)(c) of the Bankruptcy Act 1914, the CP has to be filed within three months of that date, the last date being 10 December 1952. The debtor appealed to the Divisional Court of the Chancery Division which allowed his appeal. The matter went up further and the Court of Appeal restored the decision of the registrar. The local authority later filed a CP against the debtor on 10 March 1953, and on 1 May 1953 the registrar made a receiving order. The court decided that as the act of bankruptcy was completed on 10 September 1952 when the registrar made his order, the CP thus had been filed out of time by about three months. Harman J at p 564 had said:

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> In our judgment ... the only person who can extend the time for complying with the bankruptcy notice is the registrar, or, having regard to the definition in r 3, his deputy. The rule is directory and compels the registrar to extend it *'until the application has been heard and determined'*. These words can only apply, in our judgment, to the determination before the registrar of the application to set aside the bankruptcy notice made by filing the affidavit mentioned in the rule, and cannot apply to its determination either by this court or by the Court of Appeal.

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[46] The word 'heard' was under scrutiny, though pursuant to r 179 of the Bankruptcy Rules 1952, in *Re a debtor (No 44 of 1978), ex parte the debtor v Chantry Mount and Hawthorns Ltd* [1979] 3 All ER 265. The creditor in that case had obtained judgment against the debtor and as the judgment remained unsatisfied, the creditor issued a BN against the debtor. The debtor applied to set aside the BN before the registrar but was dismissed. The debtor appealed to the Divisional Court, but before the appeal was heard a CP was filed, and at the hearing of the CP an RO was granted against the debtor. An appeal was filed at the Divisional Court against that RO on the premise that the registrar failed to take account of the pending BN appeal. By virtue of r 179 of the United Kingdom Bankruptcy Rules 1952, RO could not be made against the debtor until the application to set aside the BN had been 'heard'. The appeal was dismissed. When discussing the word 'heard' it was held that:

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> *Where a registrar had completed the hearing of an application to set aside a bankruptcy notice and given his decision on it, the application had been 'heard' for the purposes of r 179 of the 1952 rules even though an appeal against the decision was pending. Accordingly r 179 did not itself prevent a receiving order being made where an appeal was pending*, although normally the court would stand over the application to make the receiving order where there was a bona fide appeal against refusal to set aside a bankruptcy notice which was being pursued with diligence ... The appeal would therefore be dismissed. (Emphasis added.)

[47] For further comparison, let us look at the Indian provision of r 52-C of the Rules and Forms of High Court at Bombay under the Presidency Towns Insolvency Act 1909 which was discussed in the case of *Venkatlal Govindlal v Juggilal Kamalapat Hosiery* [1955] ILR Bom 1059. The brief facts are as follows: A judgment was obtained against Venkatlal Govindlal Pittie (the appellant). The respondent then took out an insolvency notice (IN/like a BN) against the appellant based on the judgment. The appellant then filed a notice of motion to set aside the IN (in Malaysia, the notice of motion in r 18 since 1 April 1993 was replaced by SIC through PUA (A) 60/1993). The Insolvency Registrar passed an order under r 52-C of the Rules and Forms of High Court at Bombay under the Presidency Towns Insolvency Act 1909 extending the time till the notice of motion was heard and determined. This rule reads:

> An application to set aside an insolvency notice, shall be made by a notice of motion, and if the application cannot be heard until after the expiry of the time specified in the notice as the day on which the act of insolvency will be complete the Insolvency Registrar shall extend the time and no act of insolvency shall be deemed to have been committed under the notice until the application shall be heard and determined.

[48] The notice of motion was heard on 8 December 1954 by the Insolvency Registrar (equivalent to a registrar) and was dismissed. The appellant filed an appeal and Desai J dismissed it on 18 March 1955. On 28 March 1955 the respondent filed a petition for adjudication (similar to our CP) founded on the act of insolvency committed by the appellant. The AO was obtained on 19 July 1955. The law requires that the petition (CP) be presented within three months from the commission of the act of insolvency. The issue before the Indian Court of Appeal headed by MC Chagla CJ, like the United Kingdom cases, was when was the notice of motion filed by the appellant 'heard and determined'. The Court of Appeal found that Desai J chose 8 March 1955, ie the date when the motion was heard and determined by him. When adopting *Re a debtor (No 10 of 1953); ex parte the debtor v Ampthill Rural District Council and Another*, Chagla CJ found that the insolvency rule in England dealing with insolvency notices was substantially in pari materia with that of India. He concluded that the motion was heard and determined on 8 December 1954 ie when decided by the insolvency judge.

[49] Chagla CJ concluded as follows:

> In our opinion, all these considerations can lead only to one conclusion that the language of r 52-C cannot admit of any other interpretation except this that application which has to be heard and determined within the language of that rule is not by any other Court except the Insolvency Court which hears the notice of motion taken out by the insolvent. This interpretation does not in any way prejudice the debtor because if a petition is presented for his adjudication after the notice of motion is dismissed and he is adjudicated insolvent on that petition and if subsequently a higher Court sets aside the insolvency notice, the order of adjudication would also be annulled because it was founded on that insolvency notice.
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> ...
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> Therefore, in our opinion, the appeal must succeed. The result is that the appeal will be allowed with costs. The order of adjudication will be set aside. Petition dismissed with costs.

[50] Returning to the local scene, even though *Ng Yen Kok v AmFinance Bhd (formerly known as MBf Finance Bhd and prior to that was known as Arab-Malaysian Finance Bhd)* [2013] 4 MLJ 225; [2013] 1 LNS 366 had occasion to approve the English decision of *Re a debtor (No 10 of 1953)*, we are unwilling to make much of this Court of Appeal case as the facts and legal issues are distinguishable. At best it endorses *Re a debtor (No 10 of 1953)*'s view that a judgment creditor must present the CP within the period stated in the statutory provision, which is settled law. There is little discussion on the issue of whether the act of bankruptcy is deferred after the registrar has heard and determined the setting aside application before the appeal is heard by the appeal court.

[51] We hold the view that due to the similarities in the provisions, it is not wrong for us to construe r 95 of the BR in line with other jurisdictions (as in the United Kingdom and India) with equipollent provisions (*Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1, per Abu Samah FCJ at p 32). The language of r 95 of the BR is such that it can only admit to the construction that once the registrar has listened with attention (with the contents of affidavit being central in the hearing) and meted down a decision, which dismisses the challenge, the matter ends there. There is no need to wait for the appeal to be heard first by the judge in chambers, like a normal litigation under appeal, before r 95 of the BR takes effect. Shorn of all the trimmings, with the challenge having been rejected by the registrar, a deferment of the act of bankruptcy takes place and count down of the six months begin. The way is now open for the CP to be filed.

[52] On the above reasons we are satisfied that r 95 of the BR is applicable in this case and thus answer questions (a) and (c) in the affirmative. Question (b) is answered in the negative. In the circumstances of the case we therefore allow the appellant's appeal with costs.

[53] We therefore set aside the decision of the Court of Appeal and reinstate the decision of the High Court.

Appeal allowed, Court of Appeal's decision set aside and decision of the High Court reinstated.

Reported by Ashok Kumar